Appeal No. 2010AP2298 **Cir. Ct. No. 2010CV355**

WISCONSIN COURT OF APPEALS
DISTRICT IV

PAYDAY LOAN STORE OF WISCONSIN, INC.,

PLAINTIFF-APPELLANT,

V.

JESICA MOUNT, P/K/A JESICA JOHNSON,

DEFENDANT-RESPONDENT.

FILED

JUN 30, 2011

A. John Voelker
Acting Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Vergeront, P.J., Lundsten and Sherman, JJ.

We certify this appeal to the Wisconsin Supreme Court to consider whether an annual interest rate in excess of a thousand percent per year for a short-term loan is per se unconscionable under the Wisconsin Consumer Act (WCA).[1] Payday Loan Stores of Wisconsin, Inc. contends that no interest rate is per se unconscionable under the WCA, because the act states that there is no limit on finance charges. It then contends that, even if the WCA allows a finding that a particular interest rate is per se unconscionable, the summary judgment material in this case was insufficient to support that determination.

[1] We believe that the other issues in dispute in this appeal may be resolved based on existing case law, either by the supreme court or by this court on remand. *See* ***State v. Post***, 197 Wis. 2d 279, 541 N.W.2d 115 (1995).

Jesica Mount contends that, despite the fact that the WCA sets no limit on finance charges, excessive interest rates may still be held per se unconscionable under the act. She also contends that the material she provided to the court was sufficient to support its determination that the interest rates in this case were unconscionable.

A decision in this case will have statewide impact on consumer credit transactions and provide guidance to lower courts faced with disputes over those transactions. Accordingly, we certify the appeal in this case to the Wisconsin Supreme Court for its review and determination.

Background

Between August 2008 and January 2009, Mount entered into multiple contracts with Payday for short-term personal loans. The annualized interest rates on the loans varied from 446% to 1338%.

Payday initiated a small claims action against Mount in December 2009 after Mount failed to make required loan payments. Mount answered the complaint, denying liability and counterclaiming for violations of the WCA.[2]

Mount moved for summary judgment, attaching the twenty loan agreements between Payday and Mount and Mount's affidavit describing the loans she entered into and their interest rates. The court determined that the interest rates were unconscionable and granted summary judgment to Mount. Payday appeals.

[2] Payday initially obtained a default judgment against Mount; however, Mount then obtained relief from the default judgment.

Discussion

Consumer transactions are regulated by WIS. STAT. chs. 421 to 427 (2009-10),[3] commonly known as the Wisconsin Consumer Act. *See* WIS. STAT. § 421.101. The issue in this case is whether the annualized interest rates for Payday's loans to Mount were per se unconscionable under WIS. STAT. § 425.107.[4] Resolving this issue requires answering two questions: (1) Does the WCA preclude a determination that a particular interest rate is unconscionable? (2) If it does not, what is the legal standard to apply and what type of evidence is necessary to establish unconscionability?

I.

Under WIS. STAT. § 425.107(1), a court may refuse to enforce a consumer credit transaction if it determines, as a matter of law, that any aspect of the transaction is unconscionable.[5] The WCA provides the following guidelines

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[4] The parties do not address whether the language of the WCA is ambiguous. The parties frame their arguments as if each has posited the only reasonable reading of the WCA; it appears, therefore, that both assert the WCA is unambiguous. However, Payday asserts that it is significant that the legislature did not simply eliminate usury laws in 1981, but replaced them with a statute specifically providing there would be no limit on finance charges on consumer credit transactions entered into after October 31, 1984. *See* WIS. STAT. § 422.201(2)(a) and (bn). In contrast, Mount points to the WCA's underlying purpose.

[5] WISCONSIN STAT. § 425.107(1) provides:

(continued)

for courts in determining whether a consumer credit transaction is unconscionable under subsection (1):

> (3) Without limiting the scope of sub. (1), the court may consider, among other things, the following as pertinent to the issue of unconscionability:
>
> (a) That the practice unfairly takes advantage of the lack of knowledge, ability, experience or capacity of customers;
>
> (b) That those engaging in the practice know of the inability of customers to receive benefits properly anticipated from the goods or services involved;
>
> (c) That there exists a gross disparity between the price of goods or services and their value as measured by the price at which similar goods or services are readily obtainable by other customers, or by other tests of true value;
>
> (d) That the practice may enable merchants to take advantage of the inability of customers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education or similar factors;
>
> (e) That the terms of the transaction require customers to waive legal rights;
>
> (f) That the terms of the transaction require customers to unreasonably jeopardize money or property beyond the money or property immediately at issue in the transaction;
>
> (g) That the natural effect of the practice would reasonably cause or aid in causing customers to

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> With respect to a consumer credit transaction, if the court as a matter of law finds that any aspect of the transaction, any conduct directed against the customer by a party to the transaction, or any result of the transaction is unconscionable, the court shall, in addition to the remedy and penalty authorized in sub. (5), either refuse to enforce the transaction against the customer, or so limit the application of any unconscionable aspect or conduct to avoid any unconscionable result.

> misunderstand the true nature of the transaction or their rights and duties thereunder;
>
> (h) That the writing purporting to evidence the obligation of the customer in the transaction contains terms or provisions or authorizes practices prohibited by law; and
>
> (i) Definitions of unconscionability in statutes, regulations, rulings and decisions of legislative, administrative or judicial bodies.

WIS. STAT. § 425.107(3).

As an initial matter, the parties dispute whether money is a "good" or "service" under WIS. STAT. § 425.107(3)(c). Mount contends that money can be a good or service under § 425.107(3)(c), and that there is a "gross disparity" between the price of the money—as measured by the interest rate on the loan—and its value. Payday contends that the WCA expressly provides that money is not a good, and that it is clearly not a service. *See* WIS. STAT. §421.301(21) ("'Goods' has the meaning given in s. 409.102(1)(ks)…."); § 409.102(1)(ks) ("'Goods' …. does not include … money…."); § 421.301(42)(a) ("'Services' includes: 1. Work, labor and other personal services; 2. Privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery accommodations, and the like; and 3. Insurance provided in connection with a consumer credit transaction.").

We do not believe that whether or not money is a good or a service is dispositive. Our reading of WIS. STAT. § 425.107(3) indicates that each of its paragraphs is a consideration for the court, but is not in itself dispositive. Subsection 425.107(1) states that remedies are available "if the court as a matter of law finds that any aspect of the [consumer credit] transaction … is unconscionable." Subsection 425.107(3), in turn, states that "[w]ithout limiting

the scope of sub. (1), the court may consider, among other things, the following as pertinent to the issue of unconscionability," and then sets forth various considerations in paragraphs (a) through (i). Among those considerations is the content of paragraph (c): "That there exists a gross disparity between the price of goods or services and their value as measured by the price at which similar goods or services are readily obtainable by other customers, or by other tests of true value." It does not follow, however, that *only* credit transactions involving goods or services under § 425.107(3)(c) may be held unconscionable under § 425.107(1); rather, § 425.107(3) states that a court *may* consider whether there is a gross disparity between the price of a good or service and its value. Thus, even if money is not a good or a service, a court could still turn to the other provisions of § 425.107(3)(c) in determining unconscionability of interest rates on a loan.

We find more significant the parties' dispute concerning WIS. STAT. § 425.107(4), which provides that:

> Any charge or practice expressly permitted by chs. 421 to 427 and 429 is not in itself unconscionable but even though a practice or charge is authorized by chs. 421 to 427 and 429, the totality of a creditor's conduct may show that such practice or charge is part of an unconscionable course of conduct.

Payday contends that the WCA expressly permits any finance charge, including any interest rate,[6] thereby precluding a court from determining that a particular interest rate is per se unconscionable under WIS. STAT. § 425.107(1). In support, it cites WIS. STAT. § 422.201(2)(bn), which states: "A consumer credit transaction

[6] Under WIS. STAT. § 421.301(20), "'Finance charge' means the sum of all charges, payable directly or indirectly by the customer as an incident to or as a condition of the extension of credit, … includ[ing] … (a) [i]nterest…."

entered into after October 31, 1984, is not subject to any maximum limit on finance charges."

Under Payday's interpretation of WIS. STAT. §§ 425.107(4) and 422.201(2)(bn), the interest rates on its loans to Mount fall within the ambit of a "charge or practice expressly permitted" by the WCA. Payday contends that the legislature enacted § 422.201(2)(bn) to foreclose claims by consumers that the interest rate of a loan is itself unconscionable by expressly permitting any amount of finance charges, including any interest rate.

Payday takes the position that the supreme court has, in cases such as ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2006 WI 53, ¶95, 290 Wis. 2d 514, 714 N.W.2d 155 (Abrahamson, C.J., concurring), indicated this is an issue best reserved to the legislature. Payday sets forth valid concerns with courts, rather than the legislature, determining which interest rates are too high. It notes the lengthy legislative process for determining whether to limit finance charges and determining appropriate limits; that a determination by the legislature would not single out one lender from the marketplace, as a court decision does; and that if court decisions may declare any particular interest rate too high, there will be no certainty for lenders as to what interest rate is acceptable, and different courts may come to different decisions on the same interest rates.

We note, however, that it appears that much of this reasoning would apply any time a court determines a lender's conduct is unconscionable. We also note that we have already recognized the difficulty inherent in judicial determinations of unconscionability. In ***Bank One Milwaukee, N.A. v. Harris***, 209 Wis. 2d 412, 420 n.5, 563 N.W.2d 543 (Ct. App. 1997), we said:

> In reaching [a determination of unconscionability under WIS. STAT. § 425.107,] we need not articulate a single, precise definition of "unconscionable." Indeed, at times, when courts are "faced with the task of trying to define what may be indefinable," they "perhaps ... could never succeed in intelligibly doing so" but may respond, as we do here: "[We] know [unconscionability] when [we] see it." ***Jacobellis v. Ohio***, 378 U.S. 184, 197, (1964) (Stewart, J., concurring).

Mount disagrees that WIS. STAT. § 422.201(2)(bn) precludes a court from determining that an interest rate is per se unconscionable under WIS. STAT. § 425.107(1). Mount asserts that the issues in this case must be analyzed in light of the stated purposes and policies of the WCA. The WCA provides that it "shall be liberally construed and applied to promote [its] underlying purposes and policies," which are:

> (a) To simplify, clarify and modernize the law concerning consumer transactions;
>
> (b) To protect customers against unfair, deceptive, false, misleading and unconscionable practices by merchants;
>
> (c) To permit and encourage the development of fair and economically sound consumer practices in consumer transactions; and
>
> (d) To coordinate the regulation of consumer credit transactions with the policies of the federal consumer protection act.

WIS. STAT. § 421.102(1) and (2).

Mount then contends that the absence of an interest rate cap does not defeat a claim that an interest rate is unconscionable, citing cases from other states and CORBIN ON CONTRACTS. *See, e.g.*, ***Johnson v. Tele-Cash, Inc.***, 82 F. Supp. 2d 264, 278-79 (D. Del. 1999), *reversed in part on other grounds by* ***Johnson v. West Suburban Bank***, 225 F.3d 366 (3d Cir. 2000) (absence of statutory cap on

interest rate did not preclude claim that interest rate was unconscionable); 2 Joseph M. Perillo and Helen Hadjiyannakis Bender, CORBIN ON CONTRACTS § 5.16 (1995) (absent a statutory cap on interest rates, interest rates are valid "up to the point at which 'unconscionability' becomes an operative factor").

We think it is unclear whether the WCA allows a court to determine that the interest rate for a short-term loan is per se unconscionable. If the legislature has "expressly permitted" lending money at any interest rate by providing that there is no maximum limit on finance charges in consumer credit transactions, then no interest rate, no matter how high, is per se unconscionable under the WCA. *See* WIS. STAT. §§ 422.201(2)(bn), 425.107(1) and (4). If, however, the act of lending money with an annual interest rate of over a thousand percent is not "expressly permitted" by the provision that there is no maximum limit on finance charges, then the claim that the interest rates in this case were per se unconscionable does not appear to be precluded under the WCA.

II.

If the WCA does not preclude a determination that a particular interest rate is per se unconscionable, it is necessary to resolve the parties' dispute over the legal standard to apply in determining unconscionability under the WCA and the type of evidence necessary.

The dispute over the legal standard concerns whether both procedural and substantive unconscionability is required. Payday contends that it is because the WCA adopts the common law definition of unconscionability. *See* WIS. STAT. § 425.107(3)(i) (court may consider common law definitions of unconscionability in determining unconscionability of consumer credit transaction under WCA); ***Jones***, 290 Wis. 2d 514, ¶29 ("For a contract or a contract provision

to be declared invalid as unconscionable, the contract or contract provision must be determined to be both procedurally and substantively unconscionable.").

In contrast, Mount argues that the WCA provides that any aspect of a contract, irrespective of the contract's formation, may be held unconscionable. She cites the language of WIS. STAT. § 425.107(1) ("any aspect" of a consumer credit transaction may be held unconscionable), § 425.107(2) ("[s]pecific practices forbidden by the administrator in rules promulgated pursuant to s. 426.108 shall be presumed to be unconscionable"), and § 425.107(3) (listing considerations for a court in determining unconscionability, including terms of the contract or practices of the merchant). She also points to ***Harris***, 209 Wis. 2d at 419, in which we relied on two of the considerations listed under § 425.107(3) and the dictionary definition of "unconscionable" to conclude that the conduct of the lender was unconscionable, rather than undertaking the common law analysis of procedural and substantive unconscionability.

The dispute over the evidence necessary to prove unconscionability under the WCA concerns the role, if any, of evidence on the short-term loan industry. Payday contends that determination of unconscionability requires evidence that the interest rate is excessive as compared to similar short-term loans, which must consist of expert testimony under WIS. STAT. § 907.02 to establish that the interest rates are not commercially reasonable in the context of the short-term loan industry. There was no such evidence here. Instead, Payday asserts, the circuit court impermissibly relied solely on its own opinion that the rates were too high in holding the loans unconscionable.

Mount disagrees that expert testimony on the short-term loan industry is necessary to prove unconscionability. She points out that the summary

judgment materials include the twenty loan agreements Mount entered into with Payday and Mount's affidavit setting forth the interest rates on the loans she entered into. Mount asserts that on this record the court properly determined as a matter of law that the interest rates were unconscionable. Mount cites WIS. STAT. § 421.108, which imposes an obligation of good faith on acts under the WCA, and defines good faith as "honesty in fact in the conduct or transaction concerned and the observance of reasonable commercial standards of fair dealing." Mount contends that an annual interest rate of over a thousand percent does not, as a matter of law, fit that definition.

We think that guidance from the supreme court on both these topics will benefit consumer law practitioners and the lower courts. ***Harris*** appears to support Mount's contention that a finding of unconscionability under the WCA does not require both procedural and substantive unconscionability. However, ***Harris*** does not address what evidence is necessary to support a claim that interest rates are unconscionable. Payday's assertion that expert testimony is necessary to establish that interest rates are not commercially reasonable in the context of the short-term loan industry appears logical. However, Payday has not identified any controlling authority on point, nor are we aware of any.[7]

[7] Mount contends that ***Matter of Disciplinary Proceedings Against Sedor***, 73 Wis. 2d 629, 245 N.W.2d 895 (1976), is controlling. She asserts that, in ***Sedor***, the court held that a loan with an effective annual interest rate of 70% was unconscionable, and thus the significantly higher interest rates here are necessarily unconscionable. *See* ***id.*** at 641 ("[T]he loan by the defendant to his client calling for terms expected to benefit him at the rate of $500 per month for 78 months over and above repayment of principal and interest at ten and one-half percent interest was indeed unconscionable."). We do not read ***Sedor***, an attorney disciplinary action involving a loan by an attorney to his client, to stand for the proposition that consumer loans with interest rates above a certain level are per se unconscionable.

(continued)

Conclusion

We believe that the question of whether the WCA precludes a court from determining that an annual interest rate on a short-term loan of over a thousand percent is unconscionable should be decided by the Wisconsin Supreme Court. Whether the WCA precludes a court from determining that an interest rate is per se unconscionable is a question of statutory interpretation that has not yet been addressed by the courts. If the WCA does not preclude a court determining that interest rates are per se unconscionable, this case presents the question of what legal standard to apply in determining unconscionability and what evidence is necessary. Because this appeal presents issues of significant statewide importance, we believe it is appropriately addressed to the Wisconsin Supreme Court.

Conversely, Payday contends that ***Sundseth v. Roadmaster Body Corp.***, 74 Wis. 2d 61, 245 N.W.2d 919 (1976), the companion case to ***Sedor***, controls. Payday points out that the ***Sundseth*** court held the loan at issue in ***Sedor*** enforceable against individual guarantors of the loan. ***Sundseth***, 74 Wis. 2d at 63-64. However, as Payday recognizes, the parties in ***Sundseth*** did not assert that the loan was unconscionable. Accordingly, we do not view either ***Sedor*** or ***Sundseth*** to provide guidance as to whether interest rates may be held per se unconscionable under the WCA.